Filed 7/27/09 P. v. Lowery CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VERONICA LOWERY, Defendant and Appellant.	E046229 (Super.Ct.No. INF059263) OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge. (Retired Judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction[1]

Defendant Veronica Hernandez Lowery appropriated $250,000 from an elderly victim. A jury convicted defendant on count 3 for receipt or concealment of stolen property and found the related enhancement to be true. (§§ 496, subd. (a), and 12022.6, subd. (a)(2).) The court acquitted defendant on counts 1 and 2 for theft from an elder and grand theft. (§§ 368, subd. (d), and 487, subd. (a).) The court sentenced defendant to four years in prison and ordered her to pay victim restitution of $241,500.

Defendant appeals, contending the court should have granted a mistrial because of inflammatory outbursts from the victim. Additionally, defendant argues the court failed to give a unanimity instruction; the conviction was not supported by substantial evidence; and the four-year sentence was an abuse of discretion.

We reject defendant's contentions and affirm the judgment.

2. Facts

On June 26, 2007, Joseph Gorman, who was 86 years old, hired defendant and her husband, Eddie Lowery,[2] to clean his residence. In the course of cleaning, defendant and Eddie found Gorman's savings of $250,000 in $100 bills, wrapped in plastic and hidden in the mattress of a convertible sofa-bed.

On the same afternoon, defendant and Eddie visited their minister, Billie Brown. Eddie counted out $8,500 for defendant to give to Brown. Brown turned the money over

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] Eddie was acquitted in a separate trial.

to the police and told them that Eddie handed the money from defendant to him. Brown also testified that Eddie was violent with defendant and threatened to report her for deportation. On June 27, defendant was worried about deportation and Brown saw Eddie trying to drag her out of a car.

In a recorded police interview, defendant said, when Eddie found the money, she wanted him to put it back because she did not want to lose her children and be deported to Mexico. Instead, he took the money, putting some in his pockets and burying the rest. Some of the money was used to buy soap and detergent. When defendant checked where the money had been buried, it was gone. She claimed Eddie had disappeared with the money. Defendant described Eddie as abusive toward her and her children.

Defendant is a Mexican citizen in this country illegally. She testified that Eddie beat her many times and she was afraid he would report her. She often was compelled to yield to his demands. Eddie instructed her to deliver the money to Brown. She did not control the money. She insisted she did not want Eddie to take the money.

Other than $8,500, the rest of the money was never recovered.

3. The Victim's Outbursts

The trial was disrupted several times by Gorman. When asked by defense counsel, Mark Sullivan, if he kept money in the couch, Gorman answered non-responsively that he was saving the money for his children's inheritance. The court granted a motion to strike the answer and ordered the jury to disregard it. When Sullivan tried to ask questions about the age of the currency, Gorman interrupted to demand, "Excuse me, sir, why don't you ask her [defendant] what they did with my money." The

court warned Gorman to wait for a question before speaking. Instead, Gorman persisted, "They have my money. They have to look and they will know whether it is old bills or new bills." Gorman interrupted again to object to Sullivan's efforts to frame a question, "Why are you assuming. They turned over $10,000 immediately to their priest or somebody with a story that they had gotten it from gambling. They borrowed $70 from me to go home that night." The court again struck Gorman's non-responsive answer. Gorman reacted angrily, "I lost $250,000, 15 or 17 years of my life. And you are talking to me like—how much money did you ever accumulate at one time, sir? [¶] . . . [¶] . . . How are you [Sullivan]—aren't you getting paid from the money she stole from me." At this juncture, defense counsel asked for a mistrial and the court called for a recess.

Outside the presence of the jury, the court then cautioned Gorman about answering the questions accurately even though he was angry. Gorman responded, "I am 90 years old. Where am I going to recover this. When they shown it two or three times that they had my money and they were using it. [¶] . . . [¶] . . . How are they paying the attorney when they didn't have a nickel? All of a sudden they have thousands of dollars."

Sullivan complained to the court about Gorman's accusation that he was being paid with the stolen money. The court agreed to conduct an inquiry of the jury the next morning.

When the court interviewed the jurors individually, some of the jurors remembered Gorman saying the defense was being paid with the stolen money and some

did not but all denied being influenced by Gorman's outbursts. One juror admitted it was an uncomfortable situation. Two others were sympathetic toward Gorman.

Defense counsel renewed the mistrial motion. But the court denied the motion, concluding the jurors were not prejudiced by Gorman's comments. The court admonished the jury not to consider his outbursts.

On appeal, defendant asserts a mistrial should have been granted because Gorman's outbursts irreparably damaged her chance of receiving a fair trial. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) She bases her argument on three points: first, the court acquitted her on counts 1 and 2; second, three of the jurors expressed sympathy toward Gorman; and third, the jury asked for a transcript of defendant's police interview.

When a witness is non-responsive to questions and offers voluntary statements, the conduct can be cured by admonishment. (*People v. Wharton* (1991) 53 Cal.3d 522, 565; *People v. Martin* (1983) 150 Cal.App.3d 148, 162-163.) "'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]' [Citation.]" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.)

Here the court questioned all the jurors and determined they were still able to be objective. The court also admonished the jury to disregard Gorman's comments. Furthermore, while Gorman's expressions of frustration and anger may have been understandable, they did not constitute prejudicial evidence against defendant. The trial

court did not abuse its discretion in denying the defense motion for mistrial. (*People v. Williams* (1997) 16 Cal.4th 153, 210.)

4. Unanimity Instruction

The trial court announced it intended to give a unanimity instruction but then apparently mistakenly omitted it. Defendant argues the jury may not have agreed on what property formed the basis for count 3, either the entire $250,000 or the $8,500 delivered from defendant to Brown.

Defendant's argument fails, however, because the unanimity instruction was not required. Count 3 concerned only $250,000. The related enhancement required that the amount involved be more than $150,000. (§ 12022.6, subd. (a)(2).) Although the prosecutor discussed several theories of liability, the prosecutor consistently maintained that count 3 involved $250,000. Based on the $8,500, the jury could not have convicted defendant of count 3 with the enhancement because the crime had to involve more than $150,000.

A unanimity instruction is required only "where the evidence shows that more than one criminal act was committed which could constitute the charged offense, and the prosecution does not rely on any single act. [Citations.]" (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.) The prosecutor's statements and arguments may be an election for jury unanimity purposes. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418.) Here the jury's verdict was necessarily based on $250,000, not $8,500. A unanimity instruction was not required and any error in its omission was harmless.

5. Substantial Evidence

Defendant next argues there was not substantial evidence to support a conviction on count 3 for receiving or concealing stolen property. (§§ 496, subd. (a), and 12022.6, subd. (a)(2).) She contends there was no evidence that she had received any of the money or that she received more than $8,500: "Possession of the stolen property may be actual or constructive and need not be exclusive.[] [Citations.] Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property. [Citations.] (*People v. Land* (1994) 30 Cal.App.4th 220, 223.) Additionally, "mere presence near the stolen property, or access to the location where the stolen property is found is not sufficient evidence of possession, standing alone, to sustain a conviction for receiving stolen property." (*Id.* at p. 224.)

Here, although there have been other interpretations of the evidence, it is certainly fair to conclude there was evidence of defendant possessing, receiving, and concealing stolen property, even if she acted together with her husband. She and Eddie found the money and removed it. She accompanied him to the place where it was buried. She delivered part of the money to Brown. She did not try to stop the crime, warn the victim, or return the money. The jury was properly instructed defendant could be liable as an aider and abettor in receiving stolen property. (CALCRIM Nos. 400, 401, and 1750.)

The standard of review requires us to consider the whole record. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We agree the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024; *People v. Garcia* (2008) 168 Cal.App.4th 261, 273.)

6. Sentencing

Defendant finally argues the court should have reduced her felony conviction to a misdemeanor or stayed her sentence on the enhancement. Defendant is not able to persuade us that the court's sentencing decision was "irrational or arbitrary" or exceeds the bounds of reason. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Defendant's criminal history and the serious nature of the offense warranted a felony sentence and the imposition of an enhancement. Defendant had multiple prison sentences and probation and parole violations. The elderly victim lost his life savings of more than $150,000. The trial court acted within its discretion by imposing a four-year prison term.

7. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.